Supreme Court, U. S.
FILED
FEB 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1146

CHARLES DAVID CARVER,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
FLORIDA COURT OF APPEALS

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IN THE

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OCTOBER TERM, 1977

NO. _____

CHARLES DAVID CARVER,
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v.

STATE OF FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA COURT OF APPEALS

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Florida Court of Appeals entered in the above case on February 16, 1977.

OPINION BELOW

The Florida Court of Appeals did not issue an opinion. A copy of that Court's *per curiam* affirmance of Petitioner's conviction is set forth in Appendix A hereto.

JURISDICTION

The Judgment of the Florida Court of Appeals was entered on February 16, 1977. An application for rehearing was timely filed and denied on March 15, 1977. A copy of said denial is set forth in Appendix B hereto. Thereafter, the Supreme Court of Florida denied a timely filed Petition for Writ of Certiorari on November 14, 1977. A copy of said denial is set forth herein in Appendix C hereto. The Court's jurisdiction is invoked under Title 28 United States Code §1257 (3).

QUESTIONS PRESENTED

1. Is Petitioner's conviction violative of the First, Fourth and Fourteenth Amendments since it is predicated upon the sole copy of a seized film for which return and/or copying was denied contrary to *Heller v. New York*, 413 U.S. 483 (1973)?

2. Has Petitioner been adjudicated guilty of a felony by a court lacking in jurisdiction contrary to the Due Process guarantees of the Fifth and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment provide:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

2. The pertinent provisions of the Fourth Amendment provide:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

> searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. The pertinent provisions of the Fifth Amendment provide:

> "No person shall . . . be deprived of life, liberty, or property without due process of law."

4. The pertinent provisions of the Fourteenth Amendment provide:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

On February 12, 1976, members of the Pinellas County, Florida Sheriff's office served Petitioner with a search warrant and seized from Petitioner the only copy of a film entitled "Virgin Rape." The search warrant had been issued upon the affidavit and *ex parte* application of a law enforcement officer who viewed the film in the commercial theatre where Petitioner was employed.

Petitioner was thereafter charged in a March 1, 1976 criminal information with the crime of custody, with intent to exhibit, of the allegedly obscene motion picture film entitled "Virgin Rape." Petitioner filed numerous motions,

including two motions requesting return and/or copying of the seized film since it was the only copy available for exhibition to the public and its seizure totally barred such exhibition. Petitioner also filed motions to quash the search warrant and to dismiss the criminal information predicated, *inter alia*, upon non-compliance with the requests for return and/or copying of the subject film.

All of Petitioner's motions were summarily denied by the trial court, and Petitioner, reserving his right to appeal from the denial of the above-referenced motions, entered a plea of no contest to the charges. The Florida Court of Appeals, on February 16, 1977, affirmed the judgment and sentence without opinion. The same court thereafter denied a Petition for Rehearing on March 16, 1977, and the Florida Supreme Court denied a Petition for Writ of Certiorari on November 14, 1977.

REASONS FOR GRANTING THE WRIT

I.

PETITIONER'S OBSCENITY CONVICTION RESTS UPON THE SOLE COPY OF A SEIZED FILM FOR WHICH RETURN AND/OR COPYING WERE DENIED CONTRARY TO THE DICTATES OF *HELLER V. NEW YORK*, 413 U.S. 483 (1973).

The principles upon which Petitioner's argument herein is based were set forth by this Court in *Heller v. New York*, 413 U.S. 483 (1973). That case upheld the right of a state to seize a motion picture film, without a prior adversary hearing, for the purpose of preserving it for evidence in an obscenity prosecution. Such authorization, however, was predicated

upon the existence of certain procedural protections designed to preserve First and Fourth Amendment interests. Among the procedural protections which this Court found necessary in *Heller* is the right to return and/or copying of the seized film if that is necessary for continued exhibition pending a judicial determination of obscenity. In this regard, the Court held:

> "On a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned." 413 U.S., at 492-93 (footnotes omitted).

In the instant case, the above referenced dictates of *Heller, supra*, were blatantly violated. On March 30, 1976, Petitioner filed a motion requesting a copy of the film at the state's expense. That motion informed the court and the state that the seized film constituted the only copy available for public exhibition. It also informed the court and the state of Petitioner's reliance upon *Heller v. New York, supra*. Upon being notified by the State's Attorney that an application for copying the film should be made in written form to the Honorable Maynard F. Swanson, County Judge, Petitioner corresponded with said judge to repeat the request for return and/or copying contained in the motion. No response was ever made to the motion or to the correspondence.

Thereafter on May 18, 1976, Petitioner filed a "Second Motion for the Return of Seized Film," again requesting compliance with the dictates of this Court in *Heller v. New York, supra*. Petitioner also filed motions to quash the search warrant and to dismiss the charges, said motions being predicated upon

non-compliance with the dictates of *Heller.* All of Petitioner's motions were denied by the trial court without opinion on May 18, 1976.

This Court, in *Heller v. New York, supra,* did not enunciate an appropriate remedy for instances in which return and/or copying is denied. The Court noted, in a footnote, that such violations effect First Amendment rather than Fourth Amendment values:

> "Failure to permit copying of seized material adversely effects First Amendment interests; prompt copying of seized material should be permitted. If copying is denied, return of the seized material should be required. On the other hand, violations of Fourth Amendment standards would require that the seized material would be excluded from evidence." 413 U.S., at 493, N.11.

The Florida Court of Appeals had occasion to deal with an identical issue in *State v. U&L Theaters, Inc.*, 307 So.2d 879 (Fla. Ct. of App. 1975). Following *Heller, supra,* the Florida Court of Appeals there held the seizure of the only copy of an allegedly obscene film to be unconstitutional when there is "no offer tendered by the State to permit copying thereof." As a remedy, the Court affirmed the order of the trial court quashing the search warrant and directing a return of the evidence.

In the case below, there was clearly no "offer tendered by the State to permit copying." Further, Petitioner's motions and correspondence seeking return and/or copying were all summarily denied without opinion. Petitioner's motions to quash the search warrant and to dismiss the charges were similarly

denied without opinion. Such clear violations of the dictates of *Heller v. New York, supra,* are sufficient to call for summary reversal of the judgment below. At the very least, they justify a grant of *certiorari* to give plenary review to the decisions below.

II.

PETITIONER HAS BEEN ADJUDICATED GUILTY OF A FELONY BY A COURT HAVING NO JURISDICTION FOR SUCH A DETERMINATION.

Petitioner was found guilty by the Pinellas County Circuit Court of a felony violation of Florida Statutes §847.011 (1) (a), involving possession of obscene material with the intent to exhibit. Florida law contains general provisions classifying obscenity offenses as misdemeanors. Florida Statutes §847.011 (1) (a), however, authorizes the prosecution of repeat offenders, starting with the second and subsequent offenses, to be charged with felony violations.

Petitioner was prosecuted for a felony in this case because of his prior conviction for a misdemeanor obscenity offense on December 12, 1975. That December 12, 1975 conviction, however, is not yet final. It was duly and timely appealed to the Florida Court of Appeals and that appellate court has not yet rendered its decision in the matter.

Florida Statutes §34.01 provides County Courts with original jurisdiction of all misdemeanor charges which are not connected with felony charges. Circuit Courts, such as the court which adjudicated Petitioner guilty of a felony have jurisdiction over felony charges pursuant to Florida Statutes §26.012. The aforementioned statutes set out jurisdiction over the subject

matter with respect to felonies and misdemeanors, and such jurisdiction can not be conferred upon a court by waiver or consent. *State v. Evans*, 225 So.2d 548 (Fla. Ct. of App. 1970), cert. denied 397 U.S. 1053 (1970).

A prerequisite to the prosecution of Petitioner for a felony in the instant case is the existence of a prior conviction for the same offense. Further, this prior conviction must be final before the Circuit Court can obtain jurisdiction over the second charge as a felony. This principle was established in *Joyner v. State*, 30 So.2d 304 (Fla. S.Ct. 1947). There, the Supreme Court of Florida stated as follows:

> "... a prior conviction to enhance punishment in a subsequent case must be final and if an appeal has been taken from a judgment of guilty in the trial court that conviction does not become final until the judgment of the lower court has been affirmed by the appellate court."

The Florida Fourth District Court of Appeals followed this principal in *Garrett v. State*, 335 So.2d 876 (Fla. Ct. of App. 1976) wherein the court ruled that a conviction from which the defendant had appealed was not final and could not be relied upon to convict him as a subsequent felony offender until affirmed by the appellate court. The Florida Second District Court of Appeals had already stated this principle in *Coleman v. State*, 281 So.2d 226 (Fla. Ct. of App. 1973).

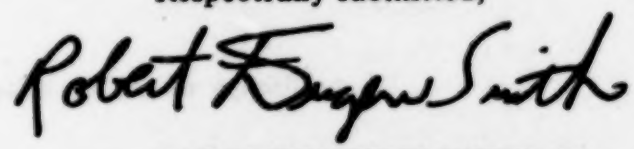
A recent case from the Florida Third District Court of Appeals, *Ledee v. State*, 342 So.2d 100 (Fla. Ct. of App. 1977) dealt with a revocation of probation based on a subsequent conviction. The principle set forth therein is applicable here. The court there held that, if an appeal has been taken from a judgment of guilt, that judgment is not final until it has been affirmed by the appellate court.

The original conviction herein was not final at the time of filing the felony charge, at the time of the felony trial, at the time the Court of Appeals affirmed the conviction, and said original conviction is still not final. Therefore, the instant case was not and is not a felony. The Circuit Court did not and does not have jurisdiction, and jurisdiction over the subject matter cannot be conferred by waiver, consent or acquiescence. The judgment and sentence of the Circuit Court is necessarily void, and the affirmance by the Florida Court of Appeals should be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment of the Florida Court of Appeals.

Respectfully submitted,



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Of Counsel:

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT
JANUARY TERM, A. D. 1977

CHARLES DAVID CARVER, *Appellant,*	)	
v.	)	CASE NO. 76-1165
STATE OF FLORIDA, *Appellee.*	)	

Opinion filed February 16, 1977.

Appeal from the Circuit Court for Pinellas County; B. J. Driver, Judge.

Norman J. Abood, Jacksonville, for Appellant.

Robert L. Shevin, Attorney General, Tallahassee, and Mary Jo M. Gallay, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM

Affirmed.

BOARDMAN, C.J., and GRIMES and SCHEB, JJ., CONCUR.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
IN AND FOR THE SECOND DISTRICT

WEDNESDAY, MARCH 16, 1977

CHARLES DAVID CARVER, *Appellant,*	)	
v.	)	CASE NO. 76-1165
STATE OF FLORIDA, *Appellee.*	)	

Counsel for appellant having filed in this cause a Motion for Rehearing and the same having been considered by the Court, it is

ORDERED that said Motion be and the same is hereby denied.

A TRUE COPY
TEST:

CLERK, DISTRICT COURT OF APPEAL
SECOND DISTRICT

cc: Norman J. Abood, Esq.
Ms. Mary Jo M. Gallay

APPENDIX C

SUPREME COURT OF FLORIDA

MONDAY, NOVEMBER 14, 1977

CHARLES DAVID CARVER, *Petitioner,*	)	
v.	)	CASE NO. 51,453
STATE OF FLORIDA, *Respondent.*	)	District Court of Appeal, Second District

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

OVERTON, C.J., BOYD, ENGLAND and KARL, JJ., concur
ADKINS, J., dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: _____
Deputy Clerk

TC
cc: Hon. William A. Haddad, Clerk
Hon. Harry W. Fogle, Judge
Hon. Harold Mullendore, Clerk
J. Richard Rahter, Esquire
Mary Jo M. Gallay, Esquire

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for Writ of Certiorari have been served upon Robert L. Shevin, Florida Attorney General by placing them in the United States mail, postage prepaid, addressed as follows: Department of Legal Affairs, the Capitol, Tallahassee, Florida 32304. This 13th day of February, 1978.

Robert Eugene Smith

ROBERT EUGENE SMITH
Counsel to Petitioner

Supreme Court, U. S.
FILED
MAY 5 1978
MICHAEL RODAK, JR., CLE

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1146

CHARLES DAVID CARVER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1146

CHARLES DAVID CARVER,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI

The State of Florida, respondent, files this response as directed by this Court and moves that the writ of certiorari be denied.

STATEMENT

On May 6, 1976, an amended criminal information was filed, charging petitioner with custody

with intent to show an obscene film entitled "Virgin Rape."

On February 12, 1976, officers of the Sheriff's Office of Pinellas County served the petitioner with a search warrant and seized a copy of the subject film herein, "Virgin Rape." The search warrant was issued both on the basis of an affidavit signed by Investigator John Lohde, who had viewed the film in a theater, and the issuing judge's determination that the film, which he had also viewed, was obscene. Thereafter, on March 30, 1976, the petitioner through his retained attorney, filed a Motion for Copy of Seized Film, requesting that he be furnished a copy of the

film at the state's expense. On May 14, 1976, the petitioner filed two motions to dismiss, the second motion to dismiss directed to his assertion of non-compliance by the state with petitioner's motion for a copy of the seized film. Petitioner also asserted that the Circuit Court of the Second Judicial Circuit of the State of Florida lacked jurisdiction to try him on a felony charge. No hearings were ever set or requested by the petitioner on those motions, nor did the petitioner present any evidence to the trial court establishing no other copy of the film to be available.

The court denied the above enumerated motions. The petitioner changed his plea from not guilty

to nolo contendere, reserving the right to appeal the denial of the pre-trial motions. A direct appeal of the petitioner's judgment and sentence was taken to the District Court of Appeal, Second District and on February 16, 1977, petitioner's judgment and sentence were affirmed without opinion. Petition for rehearing was filed and denied. Petitioner then timely filed a petition for writ of certiorari to the District Court of Appeal, Second District, in the Supreme Court of the State of Florida. On November 14, 1977, the Supreme Court determined that it lacked jurisdiction, and ordered the petition denied. Petitioner then filed the petition for writ of certiorari

initiating this cause.

QUESTIONS PRESENTED

I.

IS PETITIONER'S CONVICTION VIOLATIVE OF THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS SINCE IT WAS PREDICATED UPON THE SOLE COPY OF A SEIZED FILM FOR WHICH RETURN AND/OR COPYING WAS DENIED CONTRARY TO *HELLER v. NEW YORK*, 413 U.S. 483 (1973)?

II.

HAS PETITIONER BEEN ADJUDICATED GUILTY OF A FELONY BY A COURT LACKING IN JURISDICTION CONTRARY TO THE DUE PROCESS GUARANTEES OF THE FIFTH AND FOURTEENTH AMENDMENTS?

(As Stated by Petitioner)

ARGUMENT

I.

IS PETITIONER'S CONVICTION VIOLATIVE OF THE FIRST, FOURTH AND FOURTEENTH AMENDMENTS SINCE IT WAS PREDICATED UPON THE SOLE COPY OF A SEIZED FILM FOR WHICH RETURN AND/OR COPYING WAS DENIED CONTRARY TO *HELLER v. NEW YORK*, 413 U.S. 483 (1973)?

Petitioner's obscenity conviction rests upon his decision to enter a plea of nolo contendere to the charge of custody with intent to exhibit an obscene motion picture. The validity of the seizure of that motion picture is not challenged by the petitioner on any First or Fourth Amendment basis. Rather, he urges this Court

to exercise its discretionary certiorari jurisdiction solely upon his assertion that the courts of the State of Florida have violated the dictates of *Heller v. New York*, 413 U.S. 493 (1973) in refusing to furnish him a copy of the film seized, and that that refusal mandates a reversal of his criminal conviction.

Petitioner did, indeed, file motions requesting a copy of the film seized to be furnished to him "at state expense". No hearings were ever requested by petitioner in pursuit of such motions, nor was any showing made by him to the court that the copy of the film seized was the sole copy available. None of the State procedural rules governing discovery, by means of which a copy

of the film might have been secured, were employed by the petitioner. The ruling of the trial judge denying the return of the film was predicated upon petitioner's failure to properly pursue the State procedures for the return of the film, and not on a refusal to recognize the dictates of *Heller v. New York*, 413 U.S. 493 (1973).

This Court in *Heller v. New York*, 413 U.S. 483 (1973), required only that copying of a seized film be permitted if necessary for continued exhibition of the film pending judicial determination of the obscenity issue. Neither *Heller* nor any other authority exists in support of petitioner's conclusion that the State is required to furnish a copy of a seized film at State expense to a non-indigent

defendant. More importantly, no showing that the seizure of the copy precluded its continued exhibition was ever made by the petitioner.

The State court record presents no substantial federal question raised by the petitioner. His motions were denied in the trial court due to his failure to pursue State procedural rules, unchallenged on any constitutional basis. Petitioner argues that it is the responsibility of the State to "tender" a copy of the seized film in a cause such as petitioner's.[1] However, the *Heller* opinion

1 This language is garnered from an unfortunately constructed sentence in *State v. U&L Theatres, Inc.*, 307 So.2d 879 (Fla. 2d DCA 1975). The question in that cause was the validity of the seizure of the only copy of allegedly obscene materials prior to a

itself recognizes that it is incumbent upon the accused to demonstrate the non-availablity of additional copies and to seek copying, if available.

Additionally, petitioner seeks to have this Court mandate an extreme sanction for the alleged failure to furnish a copy of a seized film. This sanction is totally inappropriate. Essentially, petitioner argues a First and Fourteenth Amendment violation as a result of the failure to return the film. Petitioner asserts that the failure to permit copying must result in the reversal of a criminal conviction unchallenged on any other basis. The protective mantle of the

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judicial determination of probable cause by a neutral, detached magistrate.

First and Fourth Amendment does not extent this far. This Court in *Heller* enunciated the appropriate sanction: The failure to permit copying should result in the return of the seized materials.

ARGUMENT

II.

HAS PETITIONER BEEN ADJUDICATED GUILTY OF A FELONY BY A COURT LACKING IN JURISDICTION CONTRARY TO THE DUE PROCESS GUARANTEES OF THE FIFTH AND FOURTEENTH AMENDMENTS?

Petitioner did not challenge the jurisdiction of the court before which he entered his plea in the District Court of Appeal, Second District of the State of Florida, although he did so in the trial court. He did attempt to revive the issue in his petition for writ of certiorari in the District Court of Appeal, Second District filed in the Supreme Court of the State of Florida. However, his failure to argue the point before

the District Court necessarily precluded that court's having ruled on this basis, and rendered it impossible for their decision in this cause to have generated conflict with any other decisions relating to the jurisdictional question raised by petitioner. *Lake v. State*, 103 So. 2d 639 (Fla. 1958). Hence, any Federal question petitioner seeks to pursue in this petition on this point has not been properly raised before the courts of the State of Florida, since petitioner abandoned it in his direct appeal. Fla. R. App. P. 3.7(j); See also, *Evans v. Maggio*, 559 F.2d 430 (5th Cir. 1977); *Beck v. Washington*, 369 U.S. 541 (1962); *Parker v. Illinois*, 333 U.S. 571 (1948). Respondent would further note that petitioner's

prior misdemeanor convictions were affirmed by the Circuit Court of the Sixth Judicial Circuit on June 7, 1977.

CONCLUSION

WHEREFORE, based upon the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEY GENERAL

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Counsel for Respondent

CERTIFICATE OF SERVICE

I, MARY JO M. GALLAY, Counsel for Respondent, and a member of the Bar of the United States, hereby certify that on the _____ day of May, 1978, I served three copies of the Response to the Petition for Writ of Certiorari on Robert Eugene Smith, Esquire, 1409 Peachtree Street, N.E., Atlanta, Georgia 30309, by a duly addressed envelope with postage prepaid.

MARY JO M. GALLAY
Assistant Attorney General